Petition

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No._____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

MANUEL MENDOZA TORRES, MAX CANDIDO GRIEGO
SARAH GODOY, and SUSAN SMITH SPIEGEL,

Petitioners

v

UNITED STATES OF AMERICA,

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Vince D'Angelo
D'Angelo, McCarty & Vigil
Attorneys at Law
335 Jefferson, S.E., Suite B
Albuquerque, New Mexico 87108
(505) 262-2444

QUESTIONS PRESENTED FOR REVIEW

1. WHETHER, BECAUSE GOVERNMENT AGENTS DID NOT HAVE PROBABLE CAUSE TO STOP THE DEFENDANTS, THE SUBSEQUENT DETENTION AND ARREST ARE ILLEGAL, AND EVIDENCE OBTAINED DURING AND AS A RESULT OF THE ORIGINAL ILLEGAL DETENTION IS TAINTED AND MUST BE SUPPRESSED.

2. WHETHER, BECAUSE THE GOVERNMENT AGENTS HELD THE DEFENDANTS FOR A SIX-DAY PERIOD BEFORE CHARGING THEM WITH ANY CRIME, EVIDENCE GAINED DURING AND AS A RESULT OF THE EXPLOITATION OF THIS PERIOD OF ILLEGAL DETENTION SHOULD BE SUPPRESSED.

3. WHETHER THE SCOPE OF THE CONSENT TO SEARCH WAS VIOLATED AND THE EVIDENCE OBTAINED AS A RESULT OF SUCH A SEARCH SHOULD BE SUPPRESSED.

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PETITION FOR A WRIT OF CERTIORARI TO THE TENTH CIRCUIT COURT OF APPEALS

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Manuel Mendoza Torres, Max Candido Griego, Sarah Godoy, and Susan Smith Spiegel, the Petitioners herein, pray that a Writ of Certiorari issue to review the judgment of the Tenth Circuit Court of Appeals entered in the above-entitled cause on November 5, 1981.

OPINIONS BELOW

The November 5, 1981 opinion of the Tenth Circuit Court of Appeals, whose judgment is herein sought to be reviewed, is scheduled to be published and is reprinted in Appendix A hereto, infra, page 43. The January 20, 1981 judgments of the District Court of the District of New Mexico are unreported and are reprinted in Appendix B hereto, infra, page 80. The December 28, 1981 order of the Tenth Circuit Court of Appeals, denying a rehearing is reprinted in Appendix C hereto, infra, page 97.

JURISDICTION

The case to be reviewed is a criminal case in which Petitioners were convicted of violations of 18 U.S.C. §§ 2, 371, 2113(a),

2113(b), 18 App.U.S.C. §1202(a)(1). The judgment of the Tenth Circuit Court of Appeals was entered on November 5, 1981. A timely Petition for Rehearing was denied on December 28, 1981. The jurisdiction of the Supreme Court of the United States is invoked under 28 U.S.C. §1254(1).

STATUTES AND RULES INVOLVED

This case involves the Fourth Amendment of the Constitution of the United States, which provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

This case also involves the Fourteenth Amendment of the Constitution of the United States which provides, inter alia, as follows:

> An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available federal magistrate or, in the event that a federal magistrate is not reasonably available, before a state or local judical officer authorized by 18 U.S.C. §3041.

This case further involves Rule 5(a) of the Federal Rules of Criminal Procedure, which provides, inter alia, as follows:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Finally, this case involves §31-1-5(B), N.M.S.A. (1978), which provides as follows:

> Every accused shall be brought before a court having jurisdiction to release the accused without unnecessary delay.

STATEMENT OF THE CASE

Nature of the Proceedings

Manuel Mendoza Torres, Max Candido Griego, Sarah Godoy, and Susan Smith Spiegel, Petitioners herein, were indicted on October 22, 1980, in Criminal No. 80-183, in the United States District Court for the District of New Mexico, at Santa Fe, New Mexico.

Count I charged the Petitioners with conspiracy, in violation of 18 U.S.C. §§371, 2113(a) and (b). Count II charged Petitioners with bank robbery, in violation of 18 U.S.C. §2113(a) and (b), and of 18 U.S.C. §2. Counts III and IV charged Sarah Godoy and Max Candido Griego, respectively, with possession of a firearm by a felon, in violation of 18 App.U.S.C. §1202(A)(1).

A jury trial was had before Honorable Santiago E. Campos, United States District Judge, in Santa Fe, New Mexico, on December 15, 17, 18, 19, 1980. The jury returned verdicts of guilty on Counts I, II, and III, on December 19, 1980. Max Candido Griego was acquitted of Count IV on the same day.

Petitioner Torres was sentenced to serve a term of 25 years, to run consecutively

with an additional five years. Petitioner Godoy was sentenced to serve a term of 27 years, to run concurrently with an additional 5 years. Petitioner Griego was sentenced to serve a term of 25 years, to run concurrently with an additional five years. Petitioner Spiegel was sentenced to serve a term of 25 years to run concurrently with an additional 5 years.

The sentences were appealed to the Tenth Circuit Court of Appeals; Notice of Appeal was filed on January 23, 1981. The Tenth Circuit Court of Appeals affirmed the convictions on November 5, 1981 and denied Petitioners' Motion for Reconsideration on December 28, 1981.

Facts

Las Vegas police learned that the First National Bank in Las Vegas, New Mexico, was

robbed on Friday, September 26, 1980, at approximately 1:00 in the afternoon. Local police immediately notified the FBI of the bank robbery and began an immediate investigation.

Shortly thereafter, Las Vegas police discovered an abandoned Ford pickup, matching the description of a truck seen leaving the bank. Two bystanders noticed the investigation and told the police that they had seen a gold Pontiac with four or five people inside about two blocks from where the pickup was found abandoned. The police immediately put out a call on the gold Pontiac.

A short time later, the same bystanders saw a gold Pontiac parked at a liquor store and notified the police. Captain Tapia of the Las Vegas Police Department drove toward the liquor store, but, before he arrived, he

saw a gold Pontiac at a service station. The driver, a tall Spanish male wearing a trenchcoat, was seen outside the vehicle talking to a shorter Spanish male who was the driver of a tan van. A Spanish female and an Anglo female were inside the Pontiac, and a young boy was inside the van.

Tapia detained the two men and two women for about twenty minutes before other officers arrived to question them. The driver of the Pontiac was Petitioner Torres. The two women passengers were his sister, Petitioner Godoy, and Petitioner Spiegel. The driver of the van was Petitioner Griego.

Torres was asked for the registration to the Pontiac. It was registered to Max Griego; however, Torres said that he had purchased it from Griego, and Griego affirmed this. During this period of detention, the

police had not yet received descriptions of the bank robbers.

When other officers arrived on the scene, they discovered that Torres and Griego were armed. They also discovered a small caliber weapon inside the Pontiac. The police ran a check on the car, and, twenty minutes later, they "officially" placed Petitioners under arrest. This occurred between 2:30 and 3:30 in the afternoon.

Although there are two magistrate judges and two district court judges in the City of Las Vegas, with office hours until 5:00 p.m. and located no more than one mile from the place of arrest, the Petitioners were not brought before a judge for an initial presentment or arraignment. They were taken instead to the Las Vegas Police Department and questioned.

Las Vegas police, at the behest of FBI Agent Jochum, obtained a consent to search from Torres on September 26, 1981. Later that day, Torres told FBI Agent Jochum that the consent to search that he gave to the Las Vegas police was meant only to give them permission to look through his car, not to take it apart. This information and revocation or modification to the consent was apparently never relayed to the FBI. Lieutenant Sena, who was in charge of the investigation for the Las Vegas Police Department, felt that, because this was a bank robbery, jurisdiction was with the FBI, and he testified that he worked under their direction.

The gold Pontiac was impounded and taken to a storage yard when the Petitioners were arrested. The car was searched at the scene and later that evening. On September 29,

three days later, Detective Valdez of the Las Vegas Police Department again searched the car. On a final search, the Las Vegas police discovered $87,000.00 behind a panel in the back of the car.

Petitioners were arrested on Friday but were not brought before a magistrate or charged with any crime until the following Thursday.

Reasons for Plenary Consideration

Because the trial court misconstrued the Federal Rules of Criminal Procedure and the Tenth Circuit Court of Appeals misconstrued the cases upon which it relied for its affirmance, because the Court of Appeals did not adequately discuss the issues of Fourth and Fourteenth Amendment violations, and because these Constitutional rights are fundamental

ones and the Federal Rules of Criminal Procedure are fundamental guidelines which need to be construed narrowly and carefully, the Petitioners believe that the questions presented are so substantial as to require plenary consideration.

BASIS FOR FEDERAL JURISDICTION

This case was properly brought in federal court pursuant to 18 U.S.C. §3231. Petitioners were charged with violations of 18 U.S.C. §§ 2, 371, 2113(a), 2113(b), 18 App.U.S.C. §1202(a)(1).

ARGUMENT

Probable Cause

This Court has consistently ruled that nothing less than probable cause will support an arrest. See Dunaway v. New York, 442 U.S. 200 (1979). While subsequent investigations developed evidence linking Petitioners to a bank robbery, at the time the Petitioners' freedom of movement was restricted by the police, probable cause for an arrest did not exist.

In United States v. Brignoli-Ponce, 422 U.S. 873 (1975), this Court ruled that anything more than a brief stop "for a minute or two" must be supported by probable cause. It is clear that Petitioners in this case were under arrest when Captain Tapia refused to let them leave the service station. However,

at that time, the only connection between the gold Pontiac and the bank robbery was the fact that a car of that description containing four or five people had been seen two blocks away from where a pick-up, matching a description of the getaway vehicle, was abandoned. Petitioners were stopped by the police, not because there was probable cause for arrest, but because police wanted to investigate the crime.

In Dunaway, this Court stated that Terry v. Ohio, 392 U.S. 1 (1968) does not authorize the police to detain someone for an extended period of time in order to investigate a crime. Here, however, Petitioners were detained by Captain Tapia so that other police officers could conduct a custodial interrogation upon their arrival. In United States v. Perez-Esparza, 609 F.2d 1284 (9th

Cir. 1979), reh. denied (1980), the court ruled that this type of custodial interrogation was precisely the type of action condemned by the United State Supreme Court in Dunaway.

Pre-arrest evidence showed only that the bank robbing trio consisted of one female and two males; that the getaway truck was a Ford pickup, that a gold Firebird or Trans-Am left the area in which a Ford pickup was found; that the gold Firebird or Trans-Am was occupied by several people; and that one of the bank robbers wore a rain coat. Though later evidence filled in many of the gaps, the government agents knew only the above-stated facts just prior to the Petitioners' arrest.

Of these facts, the only one which might even possibly give rise to probable cause was the fact that a Firebird or Trans-Am was seen

leaving the area in which a pickup truck was abandoned. Because a gold-colored Firebird with Arizona plates was uncommon in the Las Vegas area, it was more likely to be noticed that other cars. However, it is probable that many other vehicles were also "leaving" that area, and there was not evidence to establish the fact that the Trans-Am was the only car leaving that area. Thus it was not established that government agents had probable cause to stop that car as opposed to any other car.

In a recent case, United States v. Chamberlain, 644 F.2d 1262 (9th Cir. 1980), an officer observed two men in what he considered to be suspicious circumstances. When the two men started running away from him, the officer gave chase and was successful in catching the defendant, Chamberlain. The

officer asked Chamberlain two questions, the answers to which increased the officer's suspicions, and he made Chamberlain get into the back of the patrol car, intending to detain him for further investigation while the officer attempted to locate the second suspect. Subsequent investigation over the next twenty minutes turned up incriminating evidence, and Chamberlain was officially arrested. The Ninth Circuit determined that, under Terry v. Ohio, 392 U.S. 1 (1968), the officer was justified in making the initial investigatory stop. United States v. Chamberlain, 644 F.2d at 1265. The court held, however, that circumstances did not justify the 20-minute detention and that the statements made by Chamberlain during this period, as well as subsequently-obtained evidence, were inadmissible in light of Dunaway.

Reiterating the Supreme Court principle that restraint of freedom is a seizure, whether official or not, the Ninth Circuit went on to discuss the requirements of probable cause necessary to justify the more extensive detention. The court noted that the 20-minute detention was undoubtedly the result of police work done in good faith, but the court denied the government's contention that such a detention was justified by the necessity of the circumstances or by bona fides. This was the very balancing approach which the Supreme Court rejected in Dunaway. The Ninth Circuit found that, even though the case then before it involved a lesser intrusion on Chamberlain's liberty than was imposed on the defendant in Dunaway, the 20-minute detention violated both the Fourth and Fourteenth Amendment rights.

The case at bar falls in between Dunaway and Chamberlain as far as the degree of intrusion upon the Petitioners' liberty. In Dunaway, the police went out without probable cause to pick up the accused, and, when they found him, took him to the police station. In Chamberlain, the police encountered the accused in suspicious circumstances and placed him in the back of the patrol car for twenty minutes. In our case, the police did not specifically go out to pick up the Petitioners, but neither did they encounter them in suspicious circumstances, as the Petitioners were at that time gassing up their car. Also in the case before us, the Petitioners were detained for a period of time and were then taken to the police station, at which time they were arrested and given their rights.

Finally, in Colorado v. Bannister, 449 U.S. 1 (1980), this Court held that there was probable cause to arrest the occupants of a vehicle which had been stopped by a police officer for speeding. Because the police officer had heard a radio dispatch reporting the theft of motor vehicle parts, and because the police officer was able to see the suspected stolen parts in plain view in the vehicle which he had stopped for a speeding violation, this Court felt that the arrest and seizure did not violate the Fourth Amendment.

The Tenth Circuit cited Bannister as support for affirming the Petitioners' convictions; however, the facts in Bannister are distinguishable from the facts in our case. For one thing, the Las Vegas Police did not stop the Petitioners for traffic violations;

they stopped them because of a radio report which stated that a gold car was spotted leaving the scene of an abandoned vehicle which was possibly used in a bank robbery. It is Petitioners' contention that this radio description alone did not provide probable cause to detain them. And, as noted in Bannister, "[t]here can be no question in that the stopping of a vehicle and the detention of its occupants constitute a 'seizure' within the meaning of the Fourth Amendment." 449 U.S. at 4,n.3.

There is little doubt but that the detention by the police in our case would constitute such a seizure. The question is whether or not there was probable cause. The Tenth Circuit in its slip opinion stated that the police had descriptions of the robbers and of the guns used at the time the Peti-

tioners were detained. Actually, however, the police did not have any descriptions of the bank robbers or of the weapons used at the time of the detention, and the only information which the police officers did have at that time was alone insufficient to give rise to probable cause for a twenty-minute detention.

Delay in Indictment

Petitioners' detention was illegal not only because the police had no probable cause to effect such a detention, but also because, after Petitioners' arrest, they were not brought before a magistrate without unnecessary delay.

§31-1-5(B), N.M.S.A. (1978) says "every accused shall be brought before a court having jurisdiction to release the accused without unnecessary delay." Rule 5(a) of the

Federal Rules of Criminal Procedure makes a similar requirement. The purposes of requiring an arraignment without unnecessary delay are to prevent a detention being used to obtain a confession and also to advise the defendant of his rights by a judicial officer. United States v. Chadwick, 415 F.2d 167 (10th Cir. 1969).

This Court has noted, in addition, that a "detached judgment of a neutral magistrate is essential if the Fourth Amendment is to furnish meaningful protection from unfounded interference with libery." Gerstein v. Pugh, 420 U.S. 103 (1975). As asserted earlier in this Petition, "the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following an arrest." Id.

In Mallory v. United States, 354 U.S. 449 (1957), the defendant was arrested in the afternoon and detained in the vicinity of several magistrates. Late that evening, he confessed. He was arraigned in the morning. This Court held that detention to be a violation of Rule 5(a). It noted that the Rule was not to be applied automatically or mechanically, and admitted that circumstances may justify a brief delay if, for example, a defendant's story may be quickly verified. "But the delay must not be of a nature to give an extraction of a confession." 354 U.S. at 455.

Similiarly, in Akowskey v. United States, 158 F.2d 649 (D.C.C.A. 1946), the defendant was arrested in the afternoon without a warrant and was not arraigned, but was taken to the police station. He made a con-

fession seven hours later after continuous questioning. The court held that the confession was inadmissible and that the conviction be overturned, noting in dictum that "while we recognize that in many cases circumstances may dictate that some delay ensues between arrest and commitment amounting to one, two, or many hours, such is not the case here." 158 F.2d at 650. The unreasonableness of a delay is not determined merely in terms of hours or days, but also in terms of the presence or absence of mitigating circumstances, such as inaccessibility of magistrates, pressing duties of the arresting officers, or condition of the arrested person. Id.

The delay between arrest and arraignment cannot be explained by inaccessibility of magistrates in our case, as four magistrates were within five minutes of the arrest scene.

Neither can the delay be explained by the pressing duties of the arresting officer or detaining officers, or by the physical or mental condition of the Petitioners.

If an accused is not arraigned without unnecessary delay, then his detention is illegal. The showing of a legal cause for detention is a safeguard, the purpose of which is to prevent secret interrogation. When a confession is made, or evidence is obtained, during an illegal detention, then such confession or evidence is also illegal. McNabb v. United States, 318 U.S. 332 (1943). Thus, it would seem clear that a six-day, unwarranted delay between arrest and arraignment is unreasonable, unnecessary, and therefore illegal.

If an arrest is unlawful, evidence recovered as a result thereof is tainted and

must be suppressed. The exclusion of the fruits of an unlawful arrest will occur anytime the fruits are a result of the exploitation of the illegality. Wong Sun v. United States, 371 U.S. 471 (1963). The mere giving of Miranda warnings does not necessarily save the evidence, and the government must show that the evidence should be admitted. Brown v. Illinois, 422 U.S. 590 (1975). As discussed previously, this Court in Dunaway v. New York, 442 U.S. 200 (1979) held that a detention for custodial interrogation intruded so seriously upon Fourth Amendment rights as to trigger traditional safeguards against illegal arrest. Even "voluntary" confessions with Miranda warnings just meet the threshhold requirement for Fourth Amendment analysis. 422 U.S. at 217.

Citing Brown v. Illinois, this Court identified several factors to be considered in determining whether a confession obtained as the result of exploitation of an illegal invasion should be admitted. The factors include (1) the temporal proximity of the arrest and confession, (2) the presence of intervening circumstances, and (3) the purpose and flagrancy of the official misconduct. Dunaway, 442 U.S. at 218.

In Dunaway, it was also noted that an illegal detention does not depend upon whether a defendant is technically arrested or not, for the detention still requires probable cause. Evidence taken during an investigatory stage where detention was in violation of the Fourth Amendment was excluded.

One of the more recent cases on this subject is United States v. Perez-Esparza, 609 F.2d 1284 (9th Cir. 1979), reh. denied (1980), in which the Court of Appeals held that an informant's tip was insufficient to provide probable cause for an arrest, detention, and custodial interrogation of a motorist who had been legally stopped. The court further held that, when voluntary consent was finally given after the motorist had been illegally detained for three hours, and where there had been no intervening circumstances, the consent was insufficient to avoid exclusion of contraband subsequently discovered. Detention of the Defendants for custodial interrogation intruded seriously upon their Fourth Amendment rights and triggered the traditional safeguards. Through the unconstitutional police conduct, and as the result

of an illegal detention, incriminating information was obtained. There was a lack of attenuation and intervening circumstances; thus, the consent was insufficient to avoid exclusion of the contraband subsequently discovered.

Although Federal Rules of Criminal Procedure Rule 5(a) applies only to federal officials, there was clear evidence of a "working arrangement" between the FBI and the Las Vegas Police, not just a bare suspicioun of such an arrangement. The presence of such a close working relationship would require adherence to Rule 5(a) by local authorities during the period of Petitioners' detention. Anderson v. United States, 318 U.S. 350 (1942). No one can reasonably or in good faith assert the existence of anything but a joint operation between state and federal

in our case, and the fact that this was a simultaneous undertaking did not affect federal agents' duty to comply with federal standards. See Gambino v. United States, 275 U.S. 310 (1927); United States v. Searp, 586 F.2d 1117 (6th Cir. 1978).

Because the crime being investigated, and with which the Petitioners were later charged, was federal bank robbery, the Las Vegas police correctly assumed that the FBI would take jurisdiction over the case. Lieutenant Sena of the Las Vegas Police, in response to a question at trial as to who was really running the investigation, answered, "as far as I was concerned, it was the FBI. The bank robbery are federal charges [sic] and I felt that the FBI should control jurisdiction." FBI agents were present during the questioning, and it was at the behest of FBI

agents that the Las Vegas police obtained consents to search. Due to the intermingling of the FBI and the Las Vegas police, it was difficult if not impossible, for the Petitioners to make the distinction between the governmental agencies involved.

Even the investigating officers were confused as to the interrelationship between the Las Vegas Police and the FBI. Lieutenant Sena admitted discussing the case with the FBI agents and looking to them for advice and direction. This does not amount to a mere suspicion of a working arrangement between the Las Vegas Police and the FBI. It is a very clear indication of such a working arrangement. There was some question as to who was in charge of the investigation, but there is no doubt that there was a working relationship.

Failure to allow a defendant the benefit of the detached judgment of a neutral magistrate is violative of Fourth and Fourteenth Amendment rights.

Although there are circumstances which may justify a brief delay, "the delay must not be of a nature to give an opportunity for an extraction of a confession." Mallory v. United States, 354 U.S. 449, 455 (1957).

The period of detention itself did not become illegal on the second day or the third day or the fourth day or the fifth day of the detention; it became illegal when it became unnecessary and in violation of Constitutional rights. Therefore, there is no issue here as to whether subsequent illegality alters the admissibility of evidence properly obtained. The evidence was not properly obtained in our case for it was obtained as a

direct result of the illegal detention by the government officers. It is not required that Petitioners show that government officials artificially contrived the delay. All that is required is to show that an unnecessary delay occurred, and that, during the illegal detention, evidence was obtained.

The FBI were notified and became involved as soon as the bank robbery occurred. They were alerted to the apprehension of the suspected bank robbers and that very day were at the local police station questioning the Petitioners. As in Anderson v. United States, 318 U.S. 350 (1942), the original arrests were made by state officials, and the defendants were kept in the sheriff's facilities for a number of days. Unlike the situation in Anderson, both the local police and the FBI in our case were involved in the

questioning, but, as in Anderson, the FBI made the formal arrest after six days and at that point brought the Petitioners before a magistrate.

The Tenth Circuit distinguished Anderson by noting that the crime in Anderson involved the crime of destruction of TVA property and so was "peculiarly federal from the start." A bank robbery is also peculiarly federal, for, even if the state might have concurrent jurisdiction to bring charges, federal bank robberies are traditionally considered to be within the domain of federal agencies. It was undoubtedly for this reason that the lieutenant of the Las Vegas Police stated "as far as I was concerned, it was the FBI [who was running the investigation]."

This Court in Anderson held that, though the "federal officers themselves were not

formally guilty of illegal conduct [this] does not affect the admissibility of the evidence which they secured improperly through the collaboration with state officers." 318 U.S. at 346. In our case, there was federal custody and involvement, constructive and actual, existing from the 26th of October, even though federal charges were not filed until November 1.

Scope of the Consent to Search

Above and beyond the failure to establish probable cause and to bring Petitioners before a magistrate for arraignment, there are other reasons to suppress the statements of Petitioner Torres and the evidence obtained from his car.

Not only did the law enforcement officers exploit the period of illegal deten-

tion to obtain statements, but they exploited it in order to obtain consents to search the vehicle involved as well. It is a well-established principle that a person may waive his Fourth Amendment right by consenting to a search without a warrant. Bumper v. United States, 391 U.S. 543 (1968). This waiver, however, is subject to a few conditions. The consent, of course, must be voluntary, (United States v. Page, 306 F.2d 81 (9th Cir. 1962)), clear, and unambigous. An apparent consent or a consent which is actually a bluff designed to convince a police officer that he won't find anything, is not a valid consent. Channel v. United States, 285 F.2d 217 (9th Cir. 1960); United States v. Dornblut, 261 F.2d 949 (2nd Cir. 1958), cert. denied, 360 U.S. 912.

Furthermore, consent to search may be revoked before the search is even completed. In this case, any evidence obtained after the consent was withdrawn should have been inadmissible. Lucero v. Donavan, 354 F.2d 16 (9th Cir. 1965); United States v. Bracer, 342 F.2d 522 (2nd Cir. 1965), cert. denied, 382 U.S. 954.

The Fourth Amendment right against unreasonable search and seizure may be waived in part or in whole. If the person wishes to restrict the scope of the search, either as to the area to be searched or to the methodology to be used in the search, this is part of his Constitutional right. Because his right is absolute, there is no requirement that he waive it. A person's desire to retain even part of this right must be respected. In our case, Petitioner Torres

obliging consented to allow police officers to search his car. However, as he subsequently stated to FBI Officer Jocnum, he consented only to letting the police look through his car, not to their taking it apart. The limitation on his consent was clear and unambiguous. If the government's contention is that partial consents are invalid, then the government should be prohibited from any kind of search at all, as Mr. Torres' consent as to a complete and unqualified search was not voluntary, clear, or valid. Once the scope of search has been validly limited, any evidence which is obtained as a result of procedures outside of the scope of search should be inadmissible on Fourth Amendment grounds.

Apart from the issue of whether the FBI agent had the duty to or did in fact report

the consent limitation to the Las Vegas Police, there is a real question as to whether the consent limitation should be effective to protect Petitioner Torres' rights. As noted earlier, the distinction between the FBI and the Las Vegas Police was unclear during this investigation, not only to Petitioners but also to the officers involved themselves. The confusion created was not in any way a result of Petitioners' actions, and the government should not be allowed to rely upon a technicality in order to effect its search. This is especially true when Constitutional rights have been violated. Because of the importance of voluntary and knowledgeable consent, courts have failed to uphold a consent which is given as a result of a mistake on the part of a defendant. Analogously, a limitation to consent,

reasonably but erroneously given to an improper agent of the government, should be upheld to protect the accused's Fourth Amendment right. This Court should err, if at all, on behalf of the accused when fundamental rights are at issue. Alternatively, if the Court finds that the limitation to the consent was invalid because not tendered to a proper government agent, then the consent as a whole cannot be considered voluntary, clear, or valid. Although it might have been so at the time it was given, the consent to search may be withdrawn at any time before the search is completed, just as waivers of other rights may be withdrawn.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Appendix

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee	)	
	)	
vs.	)	Nos. 81-1102
	)	1103
MANUEL MENDOZA TORRES, MAX	)	1104
CANDIDO GRIEGO, SARAH GODOY	)	1105
and SUSAN SMITH SPIEGEL,	)	
	)	
Defendants-Appellants	)	

Appeal from the United States District Court
For the District of New Mexico
Criminal No. 80-183

APPENDIX A

Wayne G. Chew, Assistant U. S. Attorney, Albuquerque, New Mexico (R. E. Thompson, United States Attorney, Albuquerque, New Mexico, with him on the brief), for Plaintiff-Appellee

Vince D'Angelo, D'Angelo, McCarty & Vigil, Albuquerque, New Mexico, for Defendants-Appellants

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Before BARRETT, DOYLE and LOGAN, Circuit Judges

DOYLE, Circuit Judge

The above named defendants-appellants seek reversal of convictions based on charges having to do with conspiring to rob a federally insured national bank with the use of dangerous weapons contrary to 18 U.S.C. § 371 and 18 U.S.C. § 2113(a)(d). Also charged in the indictment against all four defendants was the substantive crime of actual robbery of the bank, together with aiding and abetting that crime under 18 U.S.C. § 2. In addition, Sarah Sotello Godoy and Max Candido Griego were charged with possession of a firearm by a former felon in violation of 18 U.S.C. App. § 1202(a). A jury trial was had and all defendants were found guilty on all counts, except that Griego was found innocent of the possession charge.

The incident occurred on September 26, 1980. The Las Vegas police received a report

that a brown pick-up truck may have been involved. This truck was readily found abandoned located in a place close to the bank. A public service employee notified the police that a gold-colored Firebird with Arizona license plates containing several individuals had departed the area where the brown truck had been found. The police obtained a description of the robbers from victims at the bank. This included their approximate height, body type, race, sex and clothing, together with a description of the guns which had been carried. A further connecting link was the mentioned gold Firebird with Arizona license plates. It was seen by the police at a service station in Las Vegas. The four defendants were found at the station in the car and in a van which was parked beside it. The defendants were questioned by the police, and defendant Torres gave the

police consent to search the Firebird. A small caliber weapon was found in the door pouch; weapons were found on the persons of both Torres and Griego, and were confiscated. The defendants and the weapons which were found conformed to the description that the police had obtained. All of the defendants were arrested. They were taken to the Las Vegas police station for processing. The F.B.I. was immediately notified of the robbery of the bank and of the apprehension of the defendants. On that day both the local police and the F.B.I. questioned the defendants. This was carried out approximately two hours after the capture. The defendants were given Miranda warnings and they signed waiver forms. They did not request counsel. But the statements made were not inculpatory. These were denials and were an avoidance.

The police sought a search warrant for the impounded Firebird but the district attorney directed the police to first try to obtain the defendants' consent to the search of the car. Defendant Torres, the apparent owner of the Firebird, signed a consent permitting the police to make a "complete" search, and authorized the taking of "letters, papers, narcotic drugs, other drugs, material or other property." This all occurred on the very first day, that is, September 26th, including the original search, which was not a thorough one. In connection with that, the Las Vegas police found a wallet that had been identified by one of the victims of the robbery. Torres was confronted by an F.B.I [sic] agent with this wallet. He told the F.B.I. man that he did not mind the police looking through his car, but he had not intended it to be torn apart.

This statement apparently was not relayed to the Las Vegas police.

Subsequently, the police did a further search of the Firebird, and in pulling out an ashtray in the side of the door, they were able to see some money in the well of the ashtray. They then removed the air-vent cover in the side of the door, because the vent was connected to the ashtray well. There they found a bag of money which contained marked bills, later identified as having come from the First National Bank.

On September 30, following consultation with the local district attorney, the United States decided to prosecute the defendants on federal bank robbery charges. No state charges of armed robbery were ever filed by New Mexico. The following day, October 1, the United States filed the charges, and on the 2nd the defendants were arraigned for the

first time before a United States Magistrate, in Albuquerque, New Mexico.

* * * * *

The four points or contentions advanced on behalf of the appellants are:

1. That defendants were unlawfully arrested at the Las Vegas service station, because the police lacked probable cause to make the arrests.

2. That the defendants were not brought before a magistrate for six days from the time of the arrest, and therefore, there was unnecessary delay, violative of the Federal Rules of Criminal Procedure 5(a).

3. That the money found in the Firebird was obtained unlawfully, because defendant Torres had retracted his consent to the search of the vehicle.

4. That the prosecution did not adequately prove that Sarah Godoy was a convicted felon whereby she could be convicted of possession of a firearm under 18 U.S.C. App. § 1202(a).

I.

Were the defendants unlawfully arrested at the Las Vegas service station very soon after commission of the offense, whereby there was a lack of probable cause?

Our examination of the facts convinces us that there was adequate evidence to constitute probable cause justifying the arrest. The officers received information concerning the robbery at once. Much of this came in radio communications. They had the descriptions of the robbers, the guns used, information regarding the brown pick-up truck and the gold Firebird with Arionza license plates. Also relayed over the radio was information that the bank had been robbed by

a tall, slim male who was wearing a trench coat, a short, stocky male, and a woman (Godoy), all of Spanish descent, together with an Anglo woman (Spiegel). There were descriptions of two guns, one silver and one dark, square-barrelled revolver. The police were notified, also, that a gold Trans-Am Firebird was seen at Ollie's Lounge. After hearing this on the radio, Captain Tapia, of the Las Vegas Police Department, drove toward Ollie's Lounge, and saw a gold-colored Pontiac, with Arizona License plates at a service station. The driver was a tall, Spanish male, wearing a trench coat. He was outside the car, talking to a shorter, Spanish male, whose appearance coincided with the description which the police had been given. He was driving a tan van. Defendant Torres was the driver of the Pontiac; Defendant Griego was the driver of the tan van;

the two women passengers of the Pontiac were defendants Gody and Spiegel. Tapia detained all four defendants for approximately twenty minutes, until other police authorities arrived. Following the stop, the police sought and received permission from Torres to search the gold Pontiac. In the door pouch of the car, the police found a small, twenty-two caliber weapon; also found in the car later was a black leather wallet. The large square-barrelled revolver was discovered on Torres. The defendants were then placed under arrest. It was after the arrest that a silver automatic handgun was found on the person of defendant Griego, and another weapon, a forty-five caliber handgun, was descovered [sic] on the person of Torres. After that the defendants were taken to the police station and following warnings and waivers, they were questioned. It is very

clear that this was a hot pursuit situation, although the defendants may have thought that they would mislead the police by not racing out of town and being on the scene. However, the circumstances discovered coincided in every detail with the facts reported, so that the conclusion was very apparent.

There was a right in the first instance to conduct a preliminary Terry-type investigation. Having done that, the facts which were learned from this constituted ample evidence showing probable cause, justifying arrest. We must reject the argument regarding invalidity or insufficiency of evidence to justify the arrest.

It is noteworthy that three days after the original arrest, the police learned that the gold Pontiac was a stolen car. Also to be noted is that $87,700 in cash which was identified as money taken in the robbery was

found behind a panel in the back of the car. Finally, it should be pointed out that evidence sufficient to establish guilt beyond reasonable doubt is not necessary in order to justify the action which was taken by the officers. The arresting officers were able to rely on information supplied by fellow officers through radio communications. When the actual facts coincided with the original information, probable cause existed. Holt v. United States, 404 F.2d 914, 918 (10th Cir. 1968), cert. denied, 393 U.S. 1086 (1969). The officers at this point of the arrest had reasonably trustworthy information adequate to support their belief that the law had been violated. Brinegar v. United States, 388 U.S. 160, 175-176 (1949); United States v. Matthews, 615 F.2d 1279 (10th Cir. 1980); United States v. James, 496 F.Supp. 284 (W.D. Okla. 1977).

Following on the initial stop for questioning, the handguns were found on Torres and Griego. This fact, together with the descriptive information obtained shows that probable cause did exist at the moment of arrest as required under the provisions of the Fourth Amendment. See United States v. Smaldone, 485 F.2d 1333, 1350 (10tn Cir. 1973), cert. denied, 415 U.S. 936 (1974). Inasmuch as probable cause existed the warrantless arrest was proper under the Fourth Amendment. Beck v. Ohio, 379 U.S. 89 (1964). It was said, in Beck at p. 91, that the rule of probable cause is a practical non- technical conception; that requiring more would unduly hamper law enforcement.

In a relatively recent decision, Colorado v. Bannister, 101 S.Ct. 42 (1980), an officer saw occupants of a vehicle and other corraborating [sic] evidence which

matched the description from a crime scene in a police radio dispatch. The Court said that there was probable cause to arrest under those circumstances.

II.

Was the delay in bringing the defendants before a magistrate a violation of the McNabb-Mallory doctrine which renders the evidence illegal and hence inadmissible?

The defendants rely on McNabb v. United States, 318 U.S. 332 (1943), and Mallory v. United States, 354 U.S. 449 (1957). These cases hold that federal courts in their supervisory power over the administration of justice in the federal arena must exclude confessions obtained during a period of undue delay in bringing the defendants before a magistrate. The rationale for this ruling is found in preventing the police from obtaining confessions during the period of delay so as to avoid the giving of notice to the accused

that he has certain rights, including the right to counsel, and the right to remain silent. It can be said that is for the purpose of protecting the accused against the illegal obtaining of evidence. The McNabb-Mallory rule has been codified in Rule 5(a) of the Federal Rules of Criminal Procedure, which reads as follows:

> Rule 5. Initial Appearance Before the Magistrate.
>
> (a) In General. An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available federal magistrate or, in the event that a federal magistrate is not reasonably available, before a state or local judicial officer authorized by 18 U.S.C. § 3041. If a person arrested without a warrant is brought before a magistrate, a complaint shall be filed forthwith which shall comply with the requirements of Rule 4(a) with respect to the showing of probable cause. When a person, arrested with or without a warrant or given a summons, appears initially before the

> magistrate, the magistrate shall proceed in accordance with the applicable subdivisions of this rule.

The essence of the rule is to prevent invalidly obtained confessions and perhaps other evidence prior to allowing the accused to have access to the court. Whether there was original probable cause and whether the time period was reasonable is to be determined in light of all the facts and circumstances of the case. See Walton v. United States, 334 F.2d 343, 346 (10th Cir. 1964), cert. denied, 349 U.S. 991 (19675); Advisory Committee Note to Fed. Crim. P.R. 5(a);

Rule 5(a) become applicable once the accused is taken into federal custody. Hayes v. United States, 419 F.2d 1364 (10th Cir. 1969); cert. denied, 398 U.S. 941 (1070); Daro v. United States, 380 F.2d 23 (10th Cir. 1967). In this case it was not until

September 30tn that the United States determined that it would prosecute; on October 1st the federal charges were filed, and the next day the defendants were taken bfore [sic] the magistrate. They contend that the period of custody to be considered started on September 26tn, the date that the Las Vagas police arrested the defendants, because, they say, there was "a working agreement between the F.B.I. and the local police." This arrangement, appellants contend, should make all state custody into federal custody for the purposes of Rule 5(a).

Knowing the practicalities of this kind of situation, including the fact that various clearances and determinations have to be made, it is not possible to presume, as the defendants would have it, that the delay was pursuant to a working arrangement or that it

was not otherwise carried out in good faith. There is no evidence to support the suggestions of defendants.

An example of a so-called "working arrangement" is found in the Supreme Court's decision in Anderson v. United States, 318 U.S. 350 (1942). In that case, the original arrests were made by state officials and the defendants were kept in the sheriff's facility for six days. The F.B.I. did all the questioning; and when the defendants confessed on the sixth day, the F.B.I. arrested them and had them brought before a magistrate. The crime was peculiarly federal from the start; it involved the destruction of the Tennessee Valley Authority property, and it was clear that the state was only interested in helping the F.B.I. make a federal arrest. The Court found that a working arrangement existed between federal

and state officials during these six days of confinement. It was held that thought the "federal officers themselves were not formally guilty of illegal conduct [this] does not affect the admissibility of the evidence which they secured improerly through collaboration with state officers." 318 U.S. at 346.

Examination of the cases shows that there are few instances in which a woking arrangement has been found to exist. In the case of United States v. Broadhead, 413 F.2d 1351 (7th Cir. 1969), cert. denied, 396 U.S. 1017 (1970), the Court found a working arrangement where, at the behest of the F.B.I., the police set up a roadblock and arrested the defendant. The city jail was used by the F.B.I. as a temporatry detention site, and a line-up was conducted to identify the defendant Cf. United States v. Nygard,

324 F. Supp. 863 (W.D. Mo. 1971).

In the case at bar, it was incumbent upon the appellants to show that state custody was used in order to circumvent Rule 5(a), supra. United States v. Rose, 415 F.2d 742 (6th Cir.), cert. denied, 396 U.S. 971 (1969); Barrett v. United States, 384 F.2d 848 (5th Cir. 1967). More than a "bare suspicion" of a working arrangement is required to show constructive federal custody as having occurred at the moment of state arrest. United States v. Gaines, 555 F.2d 618 (7th Cir. 1977); Butterwood v [sic] United States, 365 F.2d 380 (10th Cir. 1966), cert. denied, 386 U.S. 937 (1967); Young v. United States, 344 F.2d 1006, 1010 (8th Cir.), cert. denied, 382 U.S. 867 (1965).

The defendants at bar have not shown through competent evidence that a collusive working agreement was utilized in order to

illegally postpone the appearance before the magistrate. The Las Vegas police took charge of the investigation at the outset. The bulk of the evidence was obtained the very first day. It was substantial and probably adequate to submit the case to a jury. The Las Vegas police initially investigated the bank's call for help after the robbery. They made the arrest and transported the appellants. Due to concurrent jurisdiction in the relationship with a national bank, the F.B.I. was notified about the apprehension of these individuals. There was apparently some evidence given at the suppression hearing and at the trial indicating that there was some confusion as to which authority would take charge. However, there was neither testimony from the F.B.I. nor from the Las Vegas police that the F.B.I. was in charge. This was testimony that the state was proceeding on

the possibility that the state charges of armed robbery might be filed, even though federal charges were also filed. Lt. Sena of the police did say that he felt that he should take orders from the F.B.I. and that jurisdiction lay in their hands. This, however, was a subjective viewpoint. It is not unusual, nor is it suspicious or irregular, for both state and federal officials to investigate the same suspect, and to cooperate in the solution of the crime. This does not make one the agent of the other. See Butterwood, supra, at 385. State charges were not filed against these appellants, but this is of no significance. The important point is that evidence is lacking which shows that the delay was part of an effort to avoid taking the defendants before the magistrate. There was no effort following the first statements that were made

to persuade them to make confessions. So, therefore, we fail to see a diabolic motive. Thus, the surrounding facts refute the contention.

The working relationship contention has not been successful in most instances. It has been unsuccessful in most instances, and the facts in this case are not unlike the facts in other cases which have been decided. See United states v. Lepinski, 460 F.2d 234 (10th Cir. 1972); United States v. Fallon, 457 F.2d 15 (10th Cir. 1972); Hayes v. United States, 419 F.2d 1364 (10th Cir. 1969), cert. denied, 398 U.S. 941 (1970); United States v. Rose, 415 F.2d 742 (6th Cir.), cert. denied, 396 U.S. 971 (1969); Butterwood v. United States, 365 F.2d 380 (10th Cir. 1966), cert. denied, 386 U.S. 937 (1967); United States v. Coppola, 381 F.2d 340 (2nd Cir. 1960) (en

banc), affirmed per curiam, 365 U.S. 762 (1961).

Quite apart from the question as to whether there was unlawful collaboration between the state and the federal government, we note also an alternative ground for upholding the action that was taken. This is the lack of causation between any delay and the evidence obtained. The statements, the fingerprints, the consent to search and the physical evidence were not the fruits of any illegal acitivity [sic] on the part of the police or the F.B.I. United States v. Mitchell, 322 U.S. 65 (1944). One requirement of the McNabb-Mallory supervisory rule is that the delay must contribute to or induce the allegedly tainted evidence. See United States v. Montes-Zarate, 552 F.2d 1330 (9th Cir. 1977), cert. denied, 435 U.S. 947 (1978); United States v. Fallone, 457 F.2d 15

(10th Cir. 1972); Chapman v. United States, 397 F.2d 24 (10th Cir. 1968) [sic]

The statements that were taken from the defendants were obtained when they were first brought to the Las Vegas police station (these were not inculpatory in nature). Fingerprints and other physical evidence were obtained on the same day, and the written consent for the search of the gold Firebird was also obtained shortly after their arrival at the police station. The finding of the wallet pursuant to the initial search occurred on the 26th, as well. So, there was no delay any of [sic] in obtaining this evidence, except for the money. The search for the money related back to the consent given on the first day. Thus, there is little that can be said by the defendants as to the injury or prejudice suffered as a result of the failure to take them before the

magistrate immediately.[1] The testimony of the police demonstrates that the money was recovered from the Firebird on the 29th of September, and that this evidence was obtained pursuant to the consent that was given on the 26th. It is possible that the defendant did not expect that the search would produce the money, but we cannot agree with the defendants that the consent to search thoroughly was revoked when one of the defendants was confronted with the billfold of a victim and the statement made that consent had not been given to tear the car apart. This expresses dissatisfaction with the way the search was being conducted, or the efficiency and the depth of it, but it

---

1. However, this delay surely should not be practiced by the F.B.I. or the police because it could, in different circumstances, cause the evidence to be excluded.

does not constitute a revocation of the consent.

It is further argued that the money should have been suppressed as evidence because it was not found in the car until the 29th of September. This was the result of a voluntary consent given on the 26th of September, immediately after the arrest. Thus, it was attenuated from any illegality. Cf [sic] Smith v. United States, 324 F.2d 879 (D.C. Cir. 1963); cert. denied [sic] 377 US. 954 (1964).

The authorities dealing with this general subject are usually concerned with confessions. Indeed, in Mallory, Justice Frankfurter's concern was to prevent the police from spiriting away a defendant and then giving him the "third degree" until he confesses. 354 U.S. at 354-55 [sic] There are, however, some decisions which give the

doctrine a broader effect - applicable to all evidence. See Watson v. United States, 249 F.2d 106 (D.C. Cir. 1957); United States v. Klapholz, 230 F.2d 494, 498 (2nd Cir.), cert. denied, 351 U.S. 924 (1956).

The Watson case holds that it is governed by Mallory because the facts are similar to that case. Watson had been apprehended at 6:40 p.m., upon returning to his home from his place of employment. Thereafter, he was not that day arraigned. During the evening and part of the night he was questioned and he denied all guilt until about 3:15 a.m., when he made the first oral, inculpatory disclosures. They were repeated to various officers the next morning before 9:00 a.m., when the courts in the district were opened. Many judges were available, but Watson was not presented to them. After 9:00 in the morning, still without arraignment and

lacking judicial warning, he reenacted the crime, and went to his apartment, where the police obtained the articles of clothing which were offered in evidence against him. The police spent an entire day searching the apartment. It was only some hours after this that he was arraigned. And so it was held that his admissions, his reenactment of the crime and his consent to the visit to his apartment, and his turning over the clothing were all inculpatory admissions. His reenactment of the crime, his consent to the visit to his apartment and his turning over the clothing were all under warrant, and the evidence had been so developed during the period following by many hours his arrest the previous evening. The Second Circuit held that he was not arraigned until all the evidence had been obtained; the conviction was reversed. The case is plainly distin-

guishable from this one. Considered from a factual comparison the arrest here was made almost immediately after the crime was committed, and most of the evidence was obtained on that occasion and at that time.

The situation is somewhat similar in United States v. Klapholz. Klapholz turned on whether the evidence other than the confession was to be suppressed under the McNabb rule. Judge Weinfeld had ruled that all evidence detived as a result of the government agent going to the defendant's apartment was to be suppressed. The Circuit stated that Judge Weinfeld was right in refusing to suppress evidence obtained prior to that date and hour. There is no information to the contrary in the former opinion. But as to evidence obtained in defendant's home after that time, it was held that the suppression of all such evidence was

appropriate, since the McNabb rule was not limited to the suppression of confessions.

III.

Was the consent to search the Firebird valid?

The waiver was obtained immediately after arrest. It is true that the person who claimed to be the owner of the car later said that the waiver was no longer in force, simply because, as he told the F.B.I. officer, who did not communicate it further, he did not expect the officers to tear the car apart when he consented to having it searched. But he did agree to a thorough search, and as it was said above, we do not regard this statement made to the F.B.I. agent as a statement which voided the consent which had previously been given. Unquestionably Torres gave his voluntarily consent when he signed the form which was provided him.

This explained that a complete search was to be made, and thus, of course, it logically follows permission to search contemplates a thorough search. If not thorough it is of little value. See United States v. Milhollan, 599 F.2d 518, 527 (3rd Cir. 1979), cert. denied, 100 S.Ct. 221 (1980). A complete search was authorized, and it should have been anticipated that it would be a careful one, although the defendant may have thought that the officers might overlook that money. We are not saying that a waiver under the Fourth Amendment may not be withdrawn. The question as to whether it was is, though, a factual one for the trial court and it should not be over-turned unless there exists a good reason and basis. United States v. Bracer, 342 F.2d 552 (2nd Cir.), cert. denied, 382 U.S. 954 (1965). The consent must be judged, in terms of the limitations

upon it, by the clearly erroneous standard of review. Villano v. United States, 310 F.2d 680, 684 (10tn Cir. 1962). After full consideration it is our determination that tne search that turned up the bank's money was reasonable and within the bounds of the actual consent given. United States v. Dichiarinte, 445 F.2d 126, 129 (7th Cir. 1971); Honig v. United States, 208 F.2d 916, 919 (8th Cir. 1953). As we said above, we remain unconvinced tnat there was any revocation of the authority given to search the vehicle.

IV.

Was the evidence insufficient to identify the appellant Godoy?

Godoy maintains that her conviction as a former felon for possession of a firearm, pursuant to 18 U.S.C. § 1202(a)(1) ought to be reversed. She asserts that the government

did not meet its burden in proving that she is a convicted felon. The elements of this offense are the (1) knowing and willing (2) possession of a firearm, (3) by a previously convicted felon. United States v. Cable, 446 F.2d 1007 (8th Cir. 1971). It is this question of her being a felon that is challenged.

The record discloses that an Arizona fingerprint card and an Arizona certificate of conviction and sentence on a voluntary manslaughter charge was introduced as evidence in this case. She was convicted in February of 1976 of this crime. Fingerprints were taken of the appellant and were introduced into evidence here. The parties stipulated that the prints taken in Arizona on a bank robbery charge belonged to the defendant Sarah Sotelllo Godoy. Thus, it was a question for the jury to decide whether

appellant Godoy was beyond reasonable doubt convicted of a felony. They so found. The evidence as to her identity "must be viewed in the light most favorable to the government to determine whether there is sufficient, substantial proof direct and circumstantial, together with inferences reasonably to be drawn, on which the defendant might be found guilty beyond a reasonable doubt." United States v. Swallow, 511 F.2d 514 (10th Cir. 1975); [sic] cert. denied, 423 U.S. 845. The Arizona documents provide the same three names, the same social security number and birthdate, and a similar physical description as that of the appellant in this case. Moreover, it is about the only way that proof can be made, through fingerprints and photographs at the institution. That approach was taken here, and we hold that it was adequate.

The judgment and convictions as to all four defendants are affirmed.

DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA vs.

DEFENDANT [MANUEL MENDOZA TORRES
True Name: LIBRADO GONZALES SOTELLO

Docket No. 80-183

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date ---------January 20, 1981

COUNSEL [Donald D. Vigil Retained

With Counsel

PLEA [GUILTY, and the court being satisfied that there is a factual basis for the plea,

[There being a verdict of GUILTY

APPENDIX B

FINDING & JUDGMENT

[Defendant has been convicted as charged of the offenses of Conspiracy, in violation of 18 USC 371, as charged in Count I of Indictment filed October 22, 1980; and Bank Robbery, in violation of 18 USC 2113(a) and (d), as charged in Count II of Indictment filed October 22 1980.

SENTENCE OR PROBATION ORDER

[The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

FIVE (5) YEARS as to Count I. TWENTY-FIVE (25) YEARS as to Count II.

IT IF FURTHER ORDERED that the sentence in Count II is to run consecutive to the sentence in Count I.

SPECIAL CONDITIONS OF PROBATION	
ADDITIONAL CONDITIONS OF PROBATION	[In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of tnis judgment be imposed. Tne Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period of within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.
COMMITMENT RECOMMEN- DATION	The court orders commitment to tne custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY /s/
SANTIAGO E. CAMPOS
U.S. District Judge

Date 1/20/81

DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA vs.

DEFENDANT [SARAH GODOY

Docket No. 80-183

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date ---------January 20, 1981

COUNSEL) [David D. Vigil [sic] Retained
) With Counsel

PLEA) [GUILTY, and the court being satisfied that there is a factual basis for the plea,
) [There being a verdict of GUILTY

FINDING & JUDGMENT

[Defendant has been convicted as charged of the offenses of Conspiracy, in violation of 18 USC 371; Bank Robbery, in violation of 18 USC 2113(a) and (d); and Possession of a Firearm by a Felon, in violation of 18 APPN UNC 1202(a), as charged in Counts I, II, and III of Indictment filed October 22, 1980.

SENTENCE OR PROBATION ORDER

[The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

FIVE (5) YEARS as to Count I.
TWENTY-FIVE (25) YEARS as to Count II.
TWO (2) YEARS as to Count III.

IT IF FURTHER ORDERED that the sentences in Count II and III shall run concurrent with the the sentence imposed in Count I.

SPECIAL CONDITIONS OF PROBATION	
ADDITIONAL CONDITIONS OF PROBATION	[In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period of within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMEN- DATION	The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY /s/
SANTIAGO E. CAMPOS
U.S. District Judge

Date 1/20/81

DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA vs.

DEFENDANT [MAX CANDIDO GRIEGO

Docket No. 80-183

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date ---------January 20, 1981

COUNSEL [David D. Vigil [sic] Retained With Counsel

PLEA [GUILTY, and the court being satisfied that there is a factual basis for the plea,

[There being a verdict of GUILTY

FINDING & JUDGMENT	[Defendant has been convicted as charged of the offenses of Conspiracy, in violation of 18 USC 371; and Bank Robbery, in violation of 18 USC 2113(a) and (d), as charged in Counts I and II of Indictment filed October 22, 1980.
SENTENCE OR PROBATION ORDER	[The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of FIVE (5) YEARS as to Count I. TWENTY-FIVE (25) YEARS as to Count II. IT IF FURTHER ORDERED that the sentence imposed in Count II is to run concurrent with the sentence imposed in Count I.

SPECIAL CONDITIONS OF PROBATION	
ADDITIONAL CONDITIONS OF PROBATION	[In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period of within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.
COMMITMENT RECOMMENDATION	The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY /s/
SANTIAGO E. CAMPOS
U.S. District Judge

Date 1/20/81

DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA vs.

DEFENDANT [SUSAN SMITH SPIEGEL

Docket No. 80-183

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date ---------January 20, 1981

COUNSEL [David D. Vigil [sic] Retained With Counsel

PLEA [GUILTY, and the court being satisfied that there is a factual basis for the plea,

[There being a verdict of GUILTY

FINDING & JUDGMENT	[Defendant has been convicted as charged of the offenses of Conspiracy, in violation of 178 USC 371; and Bank Robbery, in violation of 18 USC 2113(a) and (d), as charged in Counts I and II of Indictment filed October 22, 1980.
SENTENCE OR PROBATION ORDER	[The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of FIVE (5) YEARS as to Count I. TWENTY-FIVE (25) YEARS as to Count II. IT IF FURTHER ORDERED that the sentence imposed in Count II is to run concurrent with the sentence imposed in Count I.

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COMMITMENT RECOMMEN- DATION	The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY /s/

SANTIAGO E. CAMPOS
U.S. District Judge

Date 1/20/81

NOVEMBER TERM - December 4, 1981

Before Honorable James E. Barrett, Honorable William E. Doyle and Honorable James K. Logan, Circuit Judges.

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 81-1102
	)	
MANUEL MENDOZA TORRES,	)	
	)	
Defendant-Appellant.	)	

This matter comes on for consideration of appellant's petition for rehearing filed in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied.

/s/
HOWARD K. PHILLIPS, Clerk

APPENDIX C

NOVEMBER TERM - December 28, 1981

Before Honorable James E. Barrett, Honorable William E. Doyle and Honorable James K. Logan, Circuit Judges.

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	
v.	)	Nos. 81-1103
MAX CANDIDO GRIEGO, SARAH GODOY and SUSAN SMITH SPIEGEL, Defendants-Appellants.	)	81-1104 and 81-1105

This matter comes on for consideration of appellants' petitions for rehearing filed in the captioned appeals.

Upon consideration whereof, the petitions for rehearing are denied.

/s/
HOWARD K. PHILLIPS, Clerk

APPENDIX C

Opposition

Office - Supreme Court, U.S.
FILED
APR 27 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1586

In the Supreme Court of the United States

OCTOBER TERM, 1981

MANUEL MENDOZA TORRES, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

PATTY MERKAMP STEMLER
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether petitioners were unlawfully arrested.
2. Whether evidence seized from a stolen getaway car should have been suppressed at trial.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

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MANUEL MENDOZA TORRES, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 43-79) is reported at 663 F.2d 1019.

JURISDICTION

The judgments of the court of appeals were entered on November 5, 1981 (Pet. 3). A petition for rehearing filed on behalf of petitioner Torres was denied on December 4, 1981 (Pet. App. 96), and petitions

for rehearing filed on behalf of the three other petitioners were denied on December 28, 1981 (Pet. App. 97). The petition for a writ of certiorari was filed on February 23, 1982.[1] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of New Mexico, petitioners were convicted of armed bank robbery, in violation of 18 U.S.C. 2113(a) and (d), and conspiracy, in violation of 18 U.S.C. 371. Petitioner Godoy was also convicted of possession of a firearm by a previously convicted felon, in violation of 18 U.S.C. App. 1202(a). Each petitioner was sentenced to five years'

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[1] The petition for a writ of certiorari is out of time as to petitioner Torres. Rule 20.1 of the Rules of this Court provide that a petition for a writ of certiorari to review the judgment of a federal court of appeals in a criminal case must be filed within 60 days after the entry of such judgment. Timely filing of a petition for rehearing, however, tolls the running of the 60-day period. In such a case, the 60 days within which a certiorari petition may be filed are calculated from the date on which the petition for rehearing was denied. See R. Stern & E. Gressman, *Supreme Court Practice* 398-399 (5th ed. 1978). Here, petitioner Torres' petition for rehearing by the court of appeals was denied on December 4, 1981 (Pet. App. 96). Accordingly, the petition for a writ of certiorari, which was filed on February 23, 1982, was out of time as to him. At least in the circumstances of this case, where the court of appeals entered a separate judgment of affirmance as to each defendant, the fact that his co-defendants' rehearing petitions were not denied until December 28, 1981 (Pet. App. 97), is of no avail to petitioner Torres. We are attaching a copy of the separate judgment of affirmance that was entered as to petitioner Torres (App., *infra*, 1a-2a).

imprisonment on the conspiracy count and 25 years' imprisonment on the bank robbery count. In addition, Godoy received a two-year sentence on the firearm count. All sentences were imposed concurrently, except for petitioner Torres' sentences, which were to be served consecutively (Pet. App. 80-95). The court of appeals affirmed (Pet. App. 43-79).

1. On September 26, 1980, at approximately 1:00 p.m., a federally insured bank in Las Vegas, New Mexico, was robbed of $87,700. Within 10 minutes, a description of the robbers and their getaway truck was transmitted over the police radio. The robbers were two hispanic men and one hispanic woman. One of the men was 5′ 11″ and slim while the other was described as short and stocky. The slim man was wearing a trench coat. The trio carried a silver gun and a square barrelled dark revolver and had fled the scene in a brown Ford pickup truck. Shortly after the robbery, the truck was found abandoned two and one half blocks from the bank, its engine still warm. Two bystanders reported seeing a gold Firebird with Arizona license plates leave the area where the truck was found, carrying four or five passengers. The Firebird was then spotted at Ollie's Lounge in Las Vegas (Pet. App. 45-46, 51-52; I Tr. 32-35, 64-71, 87, 90, 106, 156-157; III Tr. 488-489, 512-514, 525-526; IV Tr. 640-641, 746).[2]

After hearing this latest information on the police radio, Las Vegas police captain Pat Tapia saw the Firebird at a service station located within two or three blocks of Ollie's Lounge. Captain Tapia approached the car and found petitioners Torres, Spiegel

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[2] I Tr. refers to the transcript of the suppression hearing. III Tr. and IV Tr. refer to the trial transcript. V Tr. refers to the sentencing proceedings.

and Godoy in the Firebird and petitioner Griego in a van parked next to the car. After additional officers arrived at the service station, petitioners were frisked for weapons. The officers found a .357 Magnum on petitioner Torres and a chrome-plated revolver on petitioner Griego. A check run on the Magnum revealed that it was stolen. With Torres' consent, the officers searched the Firebird and found a .22 caliber weapon in the door pouch. Petitioners were arrested and taken to the local police station (Pet. App. 46-47, 52-53; I Tr. 72, 102-117, 159-162; III Tr. 488-489, 491-494, 505-506, 510, 514-521, 527-529, 543; IV Tr. 630-631, 635).[3]

The FBI was notified of the arrests, and both federal agents and local police officers questioned petitioners while they were in state custody. Petitioners were given *Miranda* warnings and spoke to the law enforcement officers, but they made no inculpatory statements, nor did they request counsel. On the same day as the arrest, petitioner Torres consented in writing to a further search of the Firebird. He authorized the police to make a "complete" search of the car and to seize "letters, papers, narcotic drugs, other drugs, material or other property." During this search, the officers found a wallet belonging to one of the victims of the robbery on the floor of the car. When shown the wallet, Torres complained to one of the federal agents that he had not intended for the officers to tear the car apart (Pet. App. 47-48, 53; I Tr. 43-44, 62-63, 73-74, 81, 84-86, 94-95, 148-150, 161-162; IV Tr. 614-615, 658, 659-

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[3] Another weapon was found on petitioner Torres while he was being transported from the service station to the police station (III Tr. 507-508).

671, 680-689, 699-700, 704-705, 708, 711-717, 719-720, 872-876).

Three days later, the officers learned that the Firebird was stolen. They then conducted an inventory search of the car and found a bag of money from the bank robbery in the air vent in the car door. On October 1, 1980, the United States filed federal bank robbery charges against petitioners, and they were arraigned the following day (Pet. App. 49-50; I Tr. 162-167; III Tr. 546-566; IV Tr. 644-647, 680).

2. Prior to trial, petitioners moved to suppress all the evidence gathered and statements made after Captain Tapia stopped them. The district court found that the officers' detention of petitioners was supported by probable cause and that the guns were properly seized at that time. The court also found that Torres voluntarily consented to the second search of the Firebird, which yielded the wallet, and that that consent extended to the third search, which resulted in the discovery of the stolen money (I Tr. 202-206; III Tr. 398-399; V Tr. 886-889).

The court of appeals affirmed the district court's findings of probable cause and consent (Pet. App. 51-56, 69-70). It also held that none of the evidence was the fruit of an illegal delay between arrest and arraignment (*id.* at 67-68). Further, noting that petitioners were initially arrested by state officers and maintained in state custody, the court of appeals held that the FBI was under no obligation to bring petitioners before a federal judicial officer until federal charges were filed. Hence, the court ruled (*id.* at 57-66), Fed. R. Crim. P. 5(a) had not been violated.

ARGUMENT

1. Both courts below correctly found that the detention and arrest of petitioners fully comported with the requirements of the Fourth Amendment. At the time petitioners were stopped, less than an hour after the bank robbery (I Tr. 14, 28), the officers had descriptions of the three robbers and the getaway vehicles.[4] Two of the officers had found the truck abandoned only a few blocks from the bank. The officers also had the accounts of two eyewitnesses, who saw four or five people leave the abandoned truck in a gold Firebird with out-of-state license plates. As petitioners acknowledge (Pet. 17), "a gold-colored Firebird with Arizona plates was uncommon in the Las Vegas area * * *." The officers then spotted the Firebird, and its occupants fit the description of the fleeing robbers. Torres, a tall, slim man, and Griego, a short, stocky man, were accompanied by two women. This corroborated information received from the robbery victims that one of the robbers was a woman. Both courts below found these facts sufficient to establish probable cause for the arrests, and this fact-specific question does not warrant further review.

In any event, the totality of the circumstances unquestionably met the reasonable suspicion standard and warranted an investigatory stop. See *United States* v. *Cortez*, 449 U.S. 411, 417 (1981); *Terry* v. *Ohio*, 392 U.S. 1, 22-23 (1968). Once petitioners

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[4] Contrary to petitioners' suggestions (Pet. 9-10, 15, 23; but see Pet. 16), Captain Tapia, who made the initial stop (I Tr. 72, 107), testified (I Tr. 105, 113-114; III Tr. 488-489) that prior to the stop he had received descriptions of the bank robbery suspects and the vehicle in which they were traveling.

were stopped, the frisk for weapons was necessary to ensure the safety of the officers, particularly since the officers had information that the bank robbers were armed. *Adams* v. *Williams*, 407 U.S. 143, 146 (1972); *Terry* v. *Ohio*, *supra*, 392 U.S. at 23-24, 30. When the officers came upon two guns, at least one of which matched the description of a gun used in the bank robbery,[5] petitioners' further detention and subsequent arrest unquestionably were supported by probable cause.[6] Hence, the arrests created no

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[5] It is not disputed that at least the .357 Magnum, which was found on petitioner Torres, was seen, if not seized, by the officers prior to his formal arrest (Pet. App. 53). The Magnum matched the description of the square-barrelled, dark revolver that was used in the bank robbery (*ibid.*). Pursuant to petitioner Torres' oral consent, the officers also discovered the .22 caliber handgun in the door pouch of the Firebird prior to the arrests.

[6] There is no evidence to support the court of appeals' statement (Pet. App. 53), relied on by petitioners (Pet. 9), that "[Captain] Tapia detained all four defendants for approximately twenty minutes, until other police authorities arrived." The district court made no such finding and, indeed, the uncontradicted testimony of the police officers was that the time interval between Tapia's initial stop of petitioners and the arrival of additional officers (at which time the weapons, which unequivocally established probable cause, were found) was very brief (I Tr. 109, 159; III Tr. 460-461, 514-515). Accordingly, the court of appeals must have confused the time between the initial stop of petitioners and the arrival of the additional officers with the time between the initial stop and petitioners' arrest, which, the police officers estimated, was 20 minutes (I Tr. 109, 176; III Tr. 501-503) (by contrast, petitioners Spiegel, Griego and Torres estimated the time between the initial stop and their arrest at approximately one hour; I Tr. 127, 136, 141). Clearly, the fact that

"poisonous tree" on which to predicate the suppression of any evidence. Compare *Wong Sun* v. *United States*, 371 U.S. 471 (1963).

2. Petitioners also urge suppression of the items seized from the car on the grounds that (1) they were detained for several days without being brought before a judicial officer (Pet. 23-27); and (2) Torres' consent to the searches was not valid (Pet. 37-42). As we show below (see pages 9-13, *infra*), neither of these claims has merit. Moreover, regardless of the outcome of either of the arguments posited by petitioners, they are not entitled to suppression because the searches, which were supported

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petitioners were not formally placed under arrest until 20 minutes after they were stopped does not foreclose the existence of probable cause to arrest them prior to that time.

Accordingly, the cases on which petitioners rely are inapposite, since in each of them the defendant was detained for 20 minutes or more, during no part of which probable cause existed. Moreover, the defendants in those cases were subjected to more than simple detention at the location at which they were found. See *Dunaway* v. *New York*, 442 U.S. 200 (1979) (without his consent, the defendant was transported from a neighbor's house to the police station, where he was questioned in an interrogation room for an hour, at which point he confessed to the crime); *United States* v. *Chamberlin*, 644 F.2d 1262, 1267 (9th Cir. 1980), cert. denied, No. 80-1112 (June 29, 1981) (holding that a defendant's 20-minute detention was unreasonable in the absence of probable cause, specifically noting that the defendant "was not questioned briefly where he was found. He was placed in the back seat of a police car for twenty minutes"); *United States* v. *Perez-Esparza*, 609 F.2d 1284 (9th Cir. 1979) (defendant removed from his car and taken to a Border Patrol office, where he was detained for three hours in an interrogation room pending the arrival of DEA agents).

by probable cause, were permitted by the automobile exception to the warrant requirement.[7]

a. Petitioners first contend (Pet. 23-37) that the seized items should have been suppressed because petitioners were not arraigned until several days after their arrests. They rely on the supervisory rule announced in *McNabb* v. *United States*, 318 U.S. 332 (1943), and *Mallory* v. *United States*, 354 U.S. 449 (1957), which requires the exclusion of evidence seized as a result of "unnecessary delay" in bringing any accused before a magistrate following his federal arrest.

As an initial matter, petitioners' *McNabb-Mallory* claim fails because all of the evidence they seek to suppress was seized before petitioners were charged by federal authorities. See, *e.g.*, *United States* v. *Skelley*, 501 F.2d 447, 450 (7th Cir.), cert. denied, 419 U.S. 1051 (1974). The search for the bank robbers was conducted solely by the local police. Peti-

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[7] It is also doubtful that any of the petitioners has "standing" to challenge the searches of the Firebird, a stolen car. Generally, the fact that a vehicle is stolen precludes a legitimate expectation of privacy in it (see *Rakas* v. *Illinois*, 439 U.S. 128, 143-144 n.12 (1978); *United States* v. *McCambridge*, 551 F.2d 865, 870 n.2 (1st Cir. 1977); 3 W. LaFave, *Search and Seizure* § 11.3, at 573-574 (1978)). That would not necessarily be the result here if it were established that petitioners did not know that the Firebird was stolen. Nonetheless, it is clear that neither Griego, who was not even in the Firebird at the time of the stop, nor Spiegel or Godoy, who were merely passengers, has standing to challenge the searches. See *Rakas* v. *Illinois*, *supra*, 439 U.S. at 148-149. Accordingly, petitioner Torres, who drove the Firebird, is the only petitioner who arguably has standing to challenge the search of it. As we noted above (note 1, *supra*), however, the petition for a writ of certiorari is out of time as to him.

tioners were arrested by and taken into the custody of the local authorities, where they remained from September 26 until October 3, 1980 (I Tr. 124). All three searches of the Firebird were conducted by local police officers. Although the FBI was notified of the arrests and questioned petitioners at the police station, the federal government did not bring charges against petitioners until the bag of money was discovered. As the court of appeals found (Pet. App. 65), the delay in bringing charges was not part of any effort to circumvent the requirement of Fed. R. Crim. P. 5(a). Since petitioners were arraigned promptly upon the filing of federal charges against them, there was no *McNabb-Mallory* violation here.[8]

Moreover, *McNabb-Mallory* only requires the exclusion of evidence that is "secured through" unnecessary delay between arrest and arraignment. *McNabb* v. *United States*, *supra*, 318 U.S. at 345. The aim of the rule is "to avoid all the evil implications of secret interrogation of persons accused of crime." *McNabb* v. *United States*, 318 U.S. at 344. Its purpose is to limit the opportunity for the police to conduct intensive interrogation before the accused is advised of his rights by a magistrate. Here, as

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[8] Petitioners' factual contention (Pet. 31-33, 35-37) that, notwithstanding the fact that federal charges were not filed until October 1, 1980, there was a "working agreement" between the FBI and the local police that warrants suppression was properly rejected by the court of appeals (Pet. App. 60-67).

We acknowledge that New Mexico law (N.M.Stat.Ann., § 31-1-5(B) (1978)) required the State officers to bring petitioners before a local magistrate or judge following their apprehension "without unnecessary delay." Their failure to do so, however, does not render any of the seizures unconstitutional.

the court of appeals found (Pet. App. 67-68), none of the evidence seized was the fruit of unnecessary delay between arrest and arraignment.

The guns were seized contemporaneously with the arrests, "[t]he statements that were taken from [petitioners] were obtained when they were first brought to the Las Vegas police station * * * and the written consent for the search of the gold Firebird [carried out later that same day] was also obtained shortly after their arrival at the police station" (Pet. App. 68). The court of appeals further found that the search for the stolen money, which occurred three days later, "related back to the consent given on the first day" (*ibid.*). Even assuming that Torres' written consent did not extend to the subsequent search, however, that search was not the fruit of petitioners' detention, but rather was an inventory search conducted by the local officers as a result of their determination—from their independent investigation of the vehicles, not from any admissions by petitioners—that the Firebird was stolen (see page 13, *infra*).[9]

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[9] Prior decisions of this Court foreclose petitioners from arguing that the seizure of the money during the final, September 29 search was a fruit of their prior detention on the ground that, "but for" that detention, the Firebird would not have been in police custody and thus subject to the investigation (*i.e.*, the removal of a false registration plate from the outside of the car) that resulted in the discovery that it was stolen and the concomitant inventory search. See *Rawlings* v. *Kentucky*, 448 U.S. 98, 106 (1980); *United States* v. *Ceccolini*, 435 U.S. 268, 276 (1978); *Brown* v. *Illinois*, 422 U.S. 590, 603 (1975); *Wong Sun* v. *United States*, 371 U.S. 471, 487-488 (1963). Rather, the proper fruits analysis is that, since the fact that the Firebird was stolen was discoverable

b. Petitioners do not seriously challenge the validity of petitioner Torres' consent to search the Firebird except with respect to the final, September 29 search of the vehicle, which resulted in the discovery of the stolen money (Pet. 37-42). Although petitioners assert (Pet. 38) that Torres' consent was invalid because it was a consent "designed to convince a police officer that he won't find anything," the record does not show that Torres hesitated in giving the consent or qualified his consent in any manner. If Torres hoped that the police would not act on his grant of permission, he assumed the risk that his bluff would fail. Both courts below correctly found that the consent was freely given, and further review of this factual determination is not warranted. *United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 401 n.2 (1975); *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967).

Petitioners contend (Pet. 39-42) that the search of the Firebird that yielded the stolen money exceeded the scope of the consent to search that Torres had given the officers. Prior to the second search of the Firebird, which produced the wallet of one of the victims of the bank robbery, Torres had consented in writing to a "complete" search of the car. The written consent contained no limitations on the scope of the search. After the officers discovered the wallet, Torres complained that he had not intended for the police officers to tear the car apart. That Torres

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immediately upon the initial stop of the vehicle—that is, the officers' ability to discover that information was not enhanced by petitioners' allegedly unlawful detention—the inventory search that followed from that information was not a product of the challenged detention.

hoped that the officers' search would be superficial and unproductive, however, is insufficient to limit his unambiguous consent to a "complete" search. Petitioners further contend that this complaint itself constituted a retraction or at least a limitation of Torres' consent and that therefore the third search was invalid. Whatever the merit of this claim, however, the third search was not conducted pursuant to Torres' consent, but rather was an inventory search conducted by the officers after they had independently discovered that the Firebird was stolen. See *South Dakota* v. *Opperman*, 428 U.S. 364 (1976). The police clearly did not require any consent to conduct an inventory search of the stolen car. See *South Dakota* v. *Opperman*, *supra*, 428 U.S. at 376 n.10.

c. In any event, all three searches were lawful because, at the time the officers conducted each search, they had probable cause to believe that the Firebird contained evidence of the bank robbery, in particular, the stolen cash. Under the automobile exception to the warrant requirement, law enforcement officers may conduct an on-the-scene search of a car if they have probable cause to believe it contains evidence of a crime, or they may delay the search until the car has been removed from the scene. *Colorado* v. *Bannister*, 449 U.S. 1, 3 (1980); *Texas* v. *White*, 423 U.S. 67, 68 (1975); *Chambers* v. *Maroney*, 399 U.S. 42, 52 (1970); *Carroll* v. *United States*, 267 U.S. 132 (1925). In this case, a cursory search of the car for weapons was conducted at the scene of the arrest and more thorough searches were subsequently conducted at the place of impoundment. The circumstances establishing probable cause to arrest petitioners also established probable cause to search the car.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

PATTY MERKAMP STEMLER
Attorney

APRIL 1982

Appendix

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

SEPTEMBER TERM—November 5, 1981

Before Honorable James E. Barrett, Honorable William E. Doyle, and Honorable James K. Logan, Circuit Judges

No. 81-1102

(D.C. No. CR 80-183-1)

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

MANUEL MENDOZA TORRES, DEFENDANT-APPELLANT

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of New Mexico and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is affirmed. It is the further order of this court that Manuel Mendoza Torres, appellant, shall, within ten (10) days from and after the date of the filing of the mandate of this court in the district court, surrender himself to the custody of the United States Marshal for the District of New Mexico in execution of the judgment and sentence imposed upon him.

The District Court may, in its discretion, permit the appellant to surrender directly to the designated Bureau of Prisons institution for service of sentence.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS
Clerk

A true copy

Teste

HOWARD K. PHILLIPS
Clerk
U.S. Court of Appeals
Tenth Circuit

By /s/ Opal A. Carter
Deputy Clerk

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